Cruel Techniques, Unusual Secrets

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In the recent case of Glossip v. Gross*, the Supreme Court denied a death row petitioner's challenge to Oklahoma's lethal injection protocol. An important part of Justice Alito's majority opinion highlighted the existence of a relationship between the constitutionality of a punishment and the requirement of a constitutional technique available to administer the punishment.*

Far from foreclosing future challenges, this principle ironically highlights the failure of the Court to describe the relationship under the Eighth Amendment among three distinct categories of punishment: (1) the type of punishment imposed by the court—e.g., the death penalty, life without parole, or life with parole; (2) the method of punishment—the tool by which the state administers the punishment; and (3) the technique of punishment—the manner in which the state administers the method of punishment. As Justice Alito suggested, there is indeed a constitutional relationship between these categories—even though this relationship may not exist exactly as he indicated.

As such, this Article articulates a holistic model for applying the Eighth Amendment on three levels—the punishment type, method, and technique. This Article develops this taxonomy, making explicit the concepts implicit in a number of Eighth Amendment cases. To be sure, the Court has assessed types of punishments, punishment methods, and punishment techniques individually, but it has never offered a holistic framework by which to understand these related constitutional inquiries. This Article develops such an approach.

In light of the applicable framework, this Article then explores the Court's application of the Eighth Amendment with respect to the three categories, demonstrating how the Court deviates from its doctrine when considering punishment techniques. It next describes states' uses of secrecy in the context of lethal injection, uncovering the manner in which this secrecy frustrates the application of the Eighth Amendment

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framework. Further, this Article argues that the state-instigated secrecy does more than create doctrinal and societal smokescreens—it raises serious constitutional and legitimacy questions concerning lethal injection protocols. Finally, this Article concludes by exploring what transparency in execution methods might mean, both in terms of restoring dignity to death row prisoners and for the future of capital punishment in America.

TABLE OF CONTENTS

I. INTRODUCTION

"A lack of transparency results in distrust and a deep sense of insecurity."
– Dalai Lama[1]

In theory, the ways by which states execute those condemned to death have become more humane over time.[2] The shift in execution methods—from hanging and firing squads to electrocution, then to the gas chamber, and most recently to lethal injection—creates a perception of increasing societal maturity.[3] From the perspective of the average observer, death by lethal injection certainly seems more humane than death by hanging or electrocution.[4] This shift, however, tracks another phenomenon—the increased secrecy in how states carry out executions.[5] Once a public spectacle,[6] executions now resemble a quiet, serene, medical procedure.[7] Indeed, executions have become so private that they remain one of the few acts in modern society that is not visible in some form on the Internet.[8]

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[1] *Dalai Lama: I Shout and Say Harsh Words*, TELEGRAPH (May 13, 2012) (quoting the Dalia Lama), http://www.telegraph.co.uk/news/worldnews/asia/tibet/9261176/Dalai-Lama-I-shout-and-say-harsh-words.html [https://perma.cc/RQ8Y-EMPN].

[2] *See, e.g.*, STUART BANNER, THE DEATH PENALTY 206–07 (2002) (describing the "continual centralization and professionalization of punishment" and the development of new technologies of execution); *see also In re* Kemmler, 136 U.S. 436, 444, 447 (1890) (explaining that states adopted electrocution as the result of an "effort to devise a more humane method" of execution). Query, however, whether this increased decency rests only in the eyes of the observer, not the condemned. *See infra* Part IV.

[3] Jonathan S. Abernathy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUM. RTS. L. REV. 379, 422 (1996) ("[C]ontrary to what logic seems to dictate, the attempt over time has been to make the penalty of death gentle, hidden, and antiseptic."); *see also* Trop v. Dulles, 356 U.S. 86, 99–101 (1958) (plurality opinion) (explaining the "evolving standards of decency" doctrine).

[4] Indeed, as Deborah Denno has observed, one of the purposes of adopting lethal injection was to make the death penalty more palatable to observers. *See* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 86 (2002); *see also* discussion *infra* Part III.

[5] *See, e.g.*, Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 95 (2007) (describing the increased secrecy of lethal injection protocols).

[6] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 7 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing a brutal public execution involving drawing and quartering).

[7] *See* AUSTIN SARAT, GRUESOME SPECTACLES, 119–20 (2014).

[8] DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 52–54, 296–97 (2010); *see also* Annulla Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833–1937*, 36 LAW & SOC'Y REV. 607, 618 (2002) (discussing the history of audiences at executions).

Lethal injection, as commonly used by many states, involves another layer of secrecy that hides the killing—a paralytic agent such as rocuronium bromide or pancuronium bromide.[9] The use of a paralytic agent hides from those witnessing the execution what is really happening to the offender, as it renders the offender unable to move.[10] It appears that the offender strapped to the gurney is drifting off peacefully into permanent sleep as part of a carefully orchestrated medical procedure.[11] But in many cases, this paralytic agent masks the reality of the killing: the offender may be experiencing excruciating pain.[12] The third drug in many protocols, potassium chloride, serves to stop the heart of the offender, but can, with an ineffective anesthetic, "do so in a torturous manner, causing burning, searing pain."[13] Because of the paralytic, though, bystanders often cannot observe any physical reaction to this pain.[14] Further, it is difficult to tell whether the anesthesia given before the paralytic wears off prior to death.[15]

The increasing difficulty of obtaining the needed lethal injection drugs and surrounding controversy of the resulting changes in lethal injection protocols have cast a third layer of secrecy over the execution process.[16] States have, on multiple occasions, refused to disclose the types of drugs used in the protocols and have experimented with new drugs and new protocols without informing inmates of the new procedures.[17] They have also refused to disclose information concerning drug suppliers and medical personnel involved in carrying out executions.[18]

In essence, then, the secretive nature of lethal injection has resulted in a series of executions that may in reality constitute a form of hidden torture by masking severe physical and psychological pain. The trauma from lethal injection administrations may be even worse when the drugs do not work properly.[19] This seems to have happened several times in the past few years,

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[9] *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-lethal-injection [https://perma.cc/D53W-NK2T] (cataloging current state execution methods).

[10] Deborah W. Denno, *The Future of Execution Methods*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 483, 485, 490 (Charles S. Lanier et al. eds., 2009).

[11] SARAT, *supra* note 7, at 119–20.

[12] *Id.* at 120 ("[B]oth the pancuronium bromide and the third drug, potassium chloride, which causes cardiac arrest and death, have the potential to cause severe pain that would be masked by the sodium thiopental and/or the pancuronium bromide.").

[13] Glossip v. Gross, 135 S. Ct. 2726, 2781 (2015) (Sotomayor, J., dissenting).

[14] Denno, *supra* note 10, at 490.

[15] *Id.* at 485.

[16] *As Legitimate Market for Execution Drugs Dries Up, States' Execution Practices Become Increasingly Questionable*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/node/6467 [https://perma.cc/KRU2-P2ZH].

[17] *Id.*

[18] *Id.*

[19] *See* SARAT, *supra* note 7, at 122–24; Dahlia Lithwick, *When the Death Penalty Turns into Torture*, SLATE (Apr. 30, 2014), http://www.slate.com/articles/news_and_politic

resulting in horrific killings in which inmates visibly suffered for extended intervals.[20]

These procedures, however, have not gone without challenge. In June 2015, the United States Supreme Court upheld a lethal injection technique for the second time in less than a decade.[21] This decision, *Glossip v. Gross*, seemingly foreclosed further challenges to lethal injection techniques by both sanctioning Oklahoma's new protocol and adopting a doctrinal standard that petitioners will, in most cases, be unable to meet.[22]

An important part of the majority opinion in *Glossip* advanced the principle that, if a punishment is constitutional, then there must be a constitutional way to administer the punishment.[23] While seemingly foreclosing future challenges, this principle ironically highlights the constitutionality and legitimacy issues that new lethal injection procedures raise. The Court's principle suggests a constitutional relationship between the punishment of the death and the ways that states administer it.[24] This draws attention to the Court's general failure to clearly and systematically describe such a relationship and distinguish three distinct categories of punishment under the Eighth Amendment: (1) the *type* of punishment imposed by the court—e.g., the death penalty, life without parole, life with parole; (2) the *method* of punishment—the tool by which the state administers the punishment, such as lethal injection; and (3) the *technique* of punishment—the manner in which the state administers the punishment, such as by a three-drug cocktail of sodium thiopental, pancuronium bromide, and potassium chloride.[25] If, as the *Glossip* majority insisted, a constitutional method and technique must exist for a constitutionally approved type of punishment,[26] there must be a constitutional relationship between these categories. Further, the corollary principle would suggest that, for a punishment to be constitutional under the Eighth Amendment, *all three categories*—the type, the method, *and* the technique—must satisfy the applicable Eighth

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s/jurisprudence/2014/04/clayton_lockett_s_botched_execution_the_grim_but_predictable_result_of_oklahoma.html [https://perma.cc/7ZRF-X4A3].

[20] *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2732–33 (2015); SARAT, *supra* note 7, at 122–24.

[21] *Glossip*, 135 S. Ct. at 2731; *accord* Baze v. Rees, 553 U.S. 35, 41 (2008).

[22] *See, e.g.*, Jonathan Keim, Glossip v. Gross*: Holding the Line on Lethal Injections*, NAT'L REV. (June 29, 2015), http://www.nationalreview.com/bench-memos/420493/glossip-v-gross-holding-line-lethal-injection-jonathan-keim [https://perma.cc/A24T-5SF7]; Ian Millhiser, *What the Supreme Court Just Did to the Death Penalty*, THINKPROGRESS (June 29, 2015), https://thinkprogress.org/what-the-supreme-court-just-did-to-the-death-penalty-677a8b6f49e3 [https://perma.cc/XCH5-4UYC] ("*Glossip v. Gross* is a crushing blow to opponents of the death penalty.").

[23] *Glossip*, 135 S. Ct. at 2732–33 (citing *Baze*, 553 U.S. at 47).

[24] *See id.*

[25] *See infra* notes 28–30 and accompanying text.

[26] *Glossip*, 135 S. Ct. at 2732–33.

Amendment standards.[27] In the capital context, for instance, a court might sentence an offender to the death penalty (the punishment type), using a particular method (lethal injection) that implements a certain technique (the protocol for administering the drugs). Each of these three categories—the punishment type, the method, and the technique—must receive scrutiny under the Eighth Amendment.

This Article develops this taxonomy, making explicit the concepts implicit in a number of Eighth Amendment cases. To be sure, the Court has assessed punishment types,[28] methods,[29] and techniques[30] individually, but it has never offered a holistic framework by which to understand these related constitutional inquiries. This Article offers such an approach.

Having articulated the applicable framework, this Article then explores the Court's application of the Eighth Amendment, demonstrating how the Court has elected to apply a new standard in punishment technique cases. This new approach has no connection to the text or history of the Eighth Amendment, nor does it stem from the Court's own precedents. Not only is the Court's new doctrine unfounded, but it is also built on a wall of secrecy that veils many aspects of modern-day lethal injections. This, in turn, we argue, frustrates the application of the Eighth Amendment framework. The state-instigated secrecy does more than create a doctrinal smokescreen; it raises serious constitutional and legitimacy questions concerning lethal injection protocols. Finally, this Article concludes by exploring what transparency in execution methods and techniques might mean both in terms of restoring dignity to death row prisoners and for the future of capital punishment in America.

II. THE EIGHTH AMENDMENT FRAMEWORK

The Eighth Amendment to the United States Constitution proscribes "cruel and unusual punishments."[31] In over 100 years of litigation,[32] the Court has

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[27] *See id.*

[28] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 563–64, 578 (2005) (reversing a death sentence for juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 306–07, 321 (2002) (reversing the execution of a mentally retarded individual because of his lower culpability); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (reversing a death sentence for a rape conviction).

[29] *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion) (finding that a mechanical accident during the first execution attempt by means of electrocution did not make the second execution attempt unconstitutional under the Eighth Amendment); *In re* Kemmler, 136 U.S. 436, 444 (1890) (holding that electrocution is a permissible form of execution under the Eighth Amendment).

[30] *See, e.g.*, *Glossip*, 135 S. Ct. at 2731; Baze v. Rees, 553 U.S. 35, 41 (2008).

[31] U.S. CONST. amend. VIII.

[32] *See* Wilkerson v. Utah, 99 U.S. 130, 134–35 (1878) (stating in an early case that "[c]ruel and unusual punishments are forbidden by the Constitution, but . . . the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the [E]ighth [A]mendment").

assessed government actions in this context in three separate senses—examining the type of punishment,[33] the method of punishment,[34] and the punishment technique.[35] In the capital context, for instance, a court might sentence an offender to death (the type of punishment), using a particular method (lethal injection), which employs a certain technique (the protocol for administering the drugs).[36] Each of these three categories—the punishment type, the method, and the technique—receives scrutiny under the Eighth Amendment. To be sure, the Court has never articulated this three-part taxonomy as such, but it has considered the constitutionality of each of these categories depending on the challenge raised by a petitioner.

A. *The Type of Punishment*

The first level of inquiry concerning the constitutionality of a punishment under the Eighth Amendment assesses whether the type of punishment—the nature of the penalty itself—constitutes a cruel and unusual punishment.[37] For instance, one might examine whether the death penalty, imprisonment, denationalization, or even a criminal fine constitutes a cruel and unusual punishment.[38] While the Supreme Court has held that denationalization violates the Eighth Amendment, it has shied away from making such broad holdings regarding other types of punishments.[39] Indeed, aside from

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[33] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (reversing death sentences); Trop v. Dulles, 356 U.S. 86, 101–02 (1958) (plurality opinion) (holding that the Eighth Amendment bars denationalization); *see also infra* note 36.

[34] *See, e.g.*, *Francis*, 329 U.S. at 464; *Kemmler*, 136 U.S. at 444.

[35] *See, e.g.*, *Glossip*, 135 S. Ct. at 2731; *Baze*, 553 U.S. at 41.

[36] It is ordinarily a jury that imposes a punishment of death. *See* Hurst v. Florida, 136 S. Ct. 616, 624 (2016) ("The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base [the defendant's] death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."). Statutes, which may allow for the offender's election of method, ordinarily dictate the method used. *See, e.g.*, ALA. CODE § 15-18-82.1 (LEXISNEXIS 2015) ("A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution."). The technique employed in carrying out the punishment is ordinarily in the hands of the state's department of corrections. *See* Denno, *supra* note 4, at 182 tbl.20.

[37] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 560–61 (2005); Atkins v. Virginia, 536 U.S. 304, 311–12 (2002); Coker v. Georgia, 433 U.S. 584, 591 (1977) (plurality opinion).

[38] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (finding that the offender's life in prison without parole sentence did not violate the Eighth Amendment); *Furman*, 408 U.S. at 239–40 (discussing whether the death penalty violated the Eighth Amendment).

[39] *Compare* Trop v. Dulles, 356 U.S. 86, 103 (1958) (plurality opinion) ("In this country the Eighth Amendment forbids [denationalization]."), *with Furman*, 408 U.S. at 239–40 (holding the death penalty unconstitutional, but only as applied). In *Trop*, there is also the possibility that the Court was not prohibiting this punishment in all circumstances.

denationalization, the Court has never held that any particular *type* of punishment actually imposed in the United States is cruel and unusual in all situations.[40]

It is important to note that this inquiry need not be an absolute one—such punishments may generally pass constitutional muster but become impermissible as applied—when imposed for a particular crime or on a particular class of offenders, or when imposed as a mandatory sentence.[41] The most noteworthy example of this came in *Furman v. Georgia*, where the Court held that the use of the death penalty—when imposed in an arbitrary and random manner—violated the Eighth Amendment.[42] Further, the Court has held that the Eighth Amendment prohibits the mandatory imposition of death,[43] as well as the execution of juvenile offenders,[44] intellectually disabled offenders,[45] "insane" persons,[46] offenders who commit felony murder in certain circumstances,[47] and most (if not all) offenders who do not commit homicide crimes.[48] All of these cases limit the type of punishment, but only in certain narrow contexts.

Although the Court seemed to suggest that denationalization is broadly prohibited, in one part of the opinion, the language could be read to suggest that the punishment is prohibited only for the crime of desertion. *See Trop*, 356 U.S. at 93–94.

[40] *See, e.g.*, *Furman*, 408 U.S. at 384 (Burger, C.J., dissenting) ("[T]his Court has never had to hold that a mode of punishment authorized by a domestic legislature was so cruel as to be fundamentally at odds with our basic notions of decency."). In *Furman*, Justices Brennan and Marshall both argued that the death penalty was a cruel and unusual punishment generally speaking, *id.* at 305 (Brennan, J., concurring); *id.* at 371 (Marshall, J., concurring), but a majority of the Court has never accepted this argument. The Court has held that two punishments imposed by the federal government are unconstitutional, although it is not clear that the punishments are unconstitutional in all situations. *Id.* at 239–40 (majority opinion). In *Trop*, 356 U.S. at 86 (denationalization), and *Weems v. United States*, 217 U.S. 349, 382 (1910) (cadena temporal), the Court held that the imposed punishments were unconstitutional under the Eighth Amendment.

[41] *See, e.g.*, *Roper*, 543 U.S. at 578; *Atkins*, 536 U.S. at 306–07; *Coker*, 433 U.S. at 592.

[42] *Furman*, 408 U.S. at 305 (Brennan, J., concurring).

[43] Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

[44] *Roper*, 543 U.S. at 563–64, 578.

[45] *Atkins*, 536 U.S. at 306–07, 321.

[46] Panetti v. Quarterman, 551 U.S. 930, 934 (2007) (quoting Ford v. Wainwright, 477 U.S. 399, 409–10 (1986)).

[47] Enmund v. Florida, 458 U.S. 782, 801 (1982); *see also* Tison v. Arizona, 481 U.S. 137, 138, 158 (1987).

[48] Kennedy v. Louisiana, 554 U.S. 407, 413, 437 (2008) (finding the death penalty unconstitutional for those convicted of child rape, but noting that the Court was "not address[ing], for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State").

B. *The Method of Punishment*

The second level of Eighth Amendment inquiry assesses whether the general method of the punishment is cruel and unusual. For example, one may determine that the death penalty is constitutional under the first inquiry, but the second inquiry would then assess whether a particular method of imposing the death penalty—such as by lethal injection, hanging, electrocution, firing squads, etc.—might be cruel and unusual.[49] To date, the Court has never held a particular method of punishment to be unconstitutional.[50] In dicta, though, the Court has made clear that the Eighth Amendment does limit the use of barbaric methods, such as burning at the stake, quartering, and public dissection.[51] It remains an open question whether abandoned, or mostly abandoned, methods of execution such as hanging, firing squads, and electrocution still satisfy the Eighth Amendment.[52]

C. *The Technique of Punishment*

The third level of inquiry under the Eighth Amendment explores the degree to which the mechanics of a particular method might be cruel and unusual. For methods such as lethal injection, for instance, there may exist ways in which administering the lethal injection might be constitutional and other ways that may be constitutionally impermissible.[53] Similarly, incarceration techniques can also violate the Eighth Amendment, whether imposed at sentencing or the product of poor prison administration.[54]

This last category in the taxonomy of prohibited punishments is where much of modern Eighth Amendment death penalty litigation lies. In particular, there have been a number of challenges to various lethal injection protocols in

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[49] *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion); *In re* Kemmler, 136 U.S. 436, 444 (1890).

[50] *See, e.g.*, *Francis*, 329 U.S. at 464; *Kemmler*, 136 U.S. at 444.

[51] *Kemmler*, 136 U.S. at 447; Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).

[52] States are continuing to explore returning to such methods, the most recent being Mississippi. *See* William W. Berry III, *The Execution Methods Crisis*, JURIST (Apr. 3, 2017), http://www.jurist.org/forum/2017/04/the-execution-methods-crisis.php [https://perma.cc/D8F9-GMMB].

[53] *Lethal Injection: Constitutional Issue*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/lethal-injection-constitutional-issue [https://perma.cc/5S68-NYEB] (summarizing recent Supreme Court lethal injection cases); *see also* Glossip v. Gross, 135 S. Ct. 2726, 2737 (2015). *See generally* Baze v. Rees, 553 U.S. 35 (2008) (outlining various Court members' perceptions of the administration of lethal injection and the constitutionality of different lethal injection procedures).

[54] One can imagine, for instance, a sentence entailing excessive amounts of solitary confinement to violate the Eighth Amendment in certain contexts. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 884, 961 n.306 (2009).

recent years, and the Supreme Court has decided two important cases dealing with this very issue.[55]

D. *The Taxonomy as a Spectrum*

It is worth noting that, while these three aspects of punishment—type, method, and technique—are distinct, they exist as part of a spectrum of punishment. In other words, they range from a macro-view of punishment (the punishment type) down to the micro-view (the technique used to impose the punishment), and it is sometimes difficult to determine whether the punishment type, method, or technique is the appropriate category for analysis. Despite this range of punishment, though, the same constitutional prohibition on cruel and unusual punishments applies; regardless of whether the punishment type, method, or technique is at issue, "cruel and unusual punishments [shall not be] inflicted."[56] Even though the constitutional prohibition does not distinguish between punishment type, method, and technique, the Court has recently applied different analyses depending on which category of punishment is in question.[57] With little if any explanation, the Court has applied one test to the first two categories (type and method) and a different test to the third category (technique).[58] When assessing the constitutionality of techniques, the Court has strayed from its Eighth Amendment precedents.

III. THE EIGHTH AMENDMENT IN ACTION

The Supreme Court has rarely found that any particular punishment type, method, or technique, on its face, violates the Eighth Amendment prohibition on cruel and unusual punishments. Instead, questions of Eighth Amendment constitutionality usually revolve around the specific use of a punishment type, method, or technique. Historically, the Court's assessment of the constitutionality of punishments has focused on the core Eighth Amendment principle of dignity. This notion of dignity evolves as society matures, though, so the Court must continually reassess dignity in light of changing societal views of punishment and shifting accepted purposes of punishment. At the heart of the dignity focus is the importance of, and consideration for, the individual offender.

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[55] *See Glossip*, 135 S. Ct. at 2731; *Baze*, 553 U.S. at 41; *see also infra* Part IV.B.

[56] U.S. CONST. amend. VIII.

[57] *See infra* Part III.

[58] To be fair, the Court has never formally held that a particular method is unconstitutional, but it has indicated in dicta that, in assessing methods, the evolving standards of decency would apply to such situations. *See supra* note 51 and accompanying text.

A. *Core Eighth Amendment Principles*

In its 1958 case of *Trop v. Dulles*, the Court articulated two interrelated principles governing the application of the Eighth Amendment.[59] First, *Trop* established that human dignity is at the heart of the Eighth Amendment.[60] The state must treat even the worst offenders—those who have committed a series of brutal murders and those who have viciously raped children—with dignity under our Constitution.[61] The *Trop* Court also explained that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[62] In other words, the concept of dignity animating the Eighth Amendment evolves along with the evolution of societal standards concerning the punishment and treatment of individual offenders.

Dignity consistently serves as the starting principle for the Court's Eighth Amendment analysis.[63] In case after case, the Court has stated that the constitutionality of a punishment rests on the "dignity of man."[64] This dignity requirement has at least two facets: proportionality and humanness.[65] Proportionality refers to a sense of equality between the crime committed and the punishment imposed.[66] Humanness refers to the notion that the punished offender must be treated as a human being.[67] Along these lines, the Court has repeatedly stated that the Eighth Amendment prohibits torture.[68]

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[59] Trop v. Dulles, 356 U.S. 86, 99–101 (1958) (plurality opinion).

[60] *See id.* at 100. While some have criticized the use of the term "dignity" as vague and even vacuous, the Court has consistently used it in its cases with specific meanings and connotations, as explained above. *See id.* For a more developed discussion of the concept of dignity, see generally Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129.

[61] Ryan, *supra* note 60, at 2132–33. Bryan Stevenson captures this sentiment in his book *Just Mercy*, where he explains that no one deserves judgment based solely on their worst act, instead suggesting that one's personhood is more than just his or her transgressions. BRYAN STEVENSON, JUST MERCY 17–18 (2014) ("Each of us is more than the worst thing we've ever done." (emphasis omitted)).

[62] *Trop*, 356 U.S. at 101. This idea stems from the Court's decision in *Weems v. United States*, where it suggested that the application of the Eighth Amendment would change over time, as constitutional provisions were more extensive than the mischief that led to their adoption. Weems v. United States, 217 U.S. 349, 373 (1910). Interestingly, this view is consistent with an originalist view of the Eighth Amendment. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1741–43 (2008).

[63] *See* Ryan, *supra* note 60, at 2140.

[64] *See* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (quoting *Trop*, 356 U.S. at 100); *see also* Ryan, *supra* note 60, at 2142.

[65] *See* Ryan, *supra* note 60, at 2144.

[66] William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 74 (2011); Ryan, *supra* note 60, at 2145–46.

[67] *See* Ryan, *supra* note 60, at 2144.

[68] *See id.* at 2146.

Eighth Amendment proportionality issues may manifest as either excessiveness or comparative disproportionality.[69] A punishment can be disproportionate in that it imposes a sentence excessive in light of the crime committed[70] or the class of offender that committed the crime.[71] This proportionality requirement includes assessing the individual characteristics of the offender and the crime committed.[72] Further, to the extent that the punishment goes beyond the bounds of justified punishment, it would constitute cruel and unusual punishment. This includes a punishment that is imposed at least in part for the visual pleasure of the audience or of the punisher himself—a punishment involving sadism.[73]

The humanness facet of dignity largely refers to the Eighth Amendment's prohibition on torture. The Court has firmly and repeatedly stated that the Eighth Amendment prohibits all punishments involving torture.[74] For example, in *Wilkerson v. Utah*, the Court stated that "it is safe to affirm that punishments of torture, such as [public dissection and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth] [A]mendment to the Constitution."[75] More broadly, the Court's cases have clearly proscribed as cruel and unusual forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace,"[76] including methods that cause "torture or a lingering death."[77] This concept may even extend far beyond the infliction of physical pain to also encompass psychological pain—both in the

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[69] Berry, *supra* note 66, at 90.

[70] *Id.* at 94; *see also* Kennedy v. Louisiana, 554 U.S. 407, 420–21 (2008); Coker v. Georgia, 433 U.S. 584, 593–96 (1977) (plurality opinion). This also applies to juvenile life without parole (JLWOP) cases. Graham v. Florida, 560 U.S. 48, 82 (2010).

[71] Roper v. Simmons, 543 U.S. 551, 563–67 (2005); Atkins v. Virginia, 536 U.S. 304, 316–17 (2002); *see also* Berry, *supra* note 66, at 94.

[72] Lockett v. Ohio, 438 U.S. 586, 603–09 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion). This also applies to JLWOP cases. Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012).

[73] Ryan, *supra* note 60, at 2145–46; *see* Glass v. Louisiana, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (mem.); *cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463–64 (1947) (plurality opinion) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.").

[74] *See* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567, 583 (2010).

[75] Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).

[76] *Id.*

[77] *In re* Kemmler, 136 U.S. 436, 447 (1890). To be clear, there remains an open question as to whether punishments must be both "cruel" and "unusual" or whether it is a unitary concept—"cruel and unusual." *See* Ryan, *supra* note 74, at 569, 572 (arguing for the former—that the Eighth Amendment bars only punishments that satisfy *both* categories). Here, the punishments described, while inherently cruel, certainly are unusual in their administration as well.

anticipation of the severe physical pain to come, as well as the inability to exert control over stopping the infliction of pain.[78]

These facets of dignity focus in the first instance on the offender rather than on society more broadly.[79] Both in its individual Eighth Amendment cases and in its general approach to Eighth Amendment jurisprudence, the Court has suggested that its understanding of dignity revolves around the individual.[80] The proportionality facet suggests that punishment beyond what is justified by the purposes of punishment—punishment for a different reason—"loses sight of the individual" and is thus unconstitutional.[81] The humanness facet indicates that "[t]here are some punishments that are so inhumane, so uncivilized, that no one should be punished in that manner — not even humans who have committed the vilest of offenses."[82] Punishments that go beyond this boundary are also unconstitutional.[83] This Eighth Amendment focus on the individual offender suggests that, although a punishment's impact on society may be important, dignity requires consideration of the offender himself.[84]

As the *Trop* Court explained, our standards of decency evolve over time, so courts must continuously reassess our understanding of dignity.[85] To determine whether society has evolved to a point such that a particular punishment contravenes modern dignity standards and thus has become cruel and unusual, courts examine both objective and subjective indicia of societal values.[86]

The primary objective indicium is the acceptance or rejection of the punishment by state legislatures.[87] The Court has also occasionally examined the frequency with which juries impose the punishment, the opinions of

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[78] *See Kemmler*, 136 U.S. at 447; *Wilkerson*, 99 U.S. at 135–36; *see also* Jones v. Davis, 806 F.3d 538, 541 (9th Cir. 2015) (reversing on *Teague* grounds the question of whether lengthy delays between sentencing and executions make punishments cruel and unusual (citing Teague v. Lane, 489 U.S. 288 (1989))); Matt Ford, *California's Death Penalty Returns*, ATLANTIC (Nov. 13, 2015), http://www.theatlantic.com/politics/archive/2015/11/california-death-penalty-ruling/415716/ [https://perma.cc/GH45-5DWD].

[79] *See* Ryan, *supra* note 60, at 2132.

[80] *See id.* at 2144.

[81] *Id.*

[82] *Id.*

[83] *See id.*

[84] *Id.* at 2132.

[85] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); *see also* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 849, 868 (2007).

[86] *See* Kennedy v. Louisiana, 554 U.S. 407, 434 (2008); Roper v. Simmons, 543 U.S. 551, 563 (2005); Atkins v. Virginia, 536 U.S. 304, 312–13 (2002); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

[87] *See Coker*, 433 U.S. at 594. This approach, which ordinarily equates to relatively simple state-counting, constitutes a measure of the punishment's unusualness, although the Court may subtly be moving away from this method. *See* Miller v. Alabama, 132 S. Ct. 2455, 2470–72 (2012).

professional organizations, and international consensus.[88] This examination of the acceptance or rejection of punishments roughly tracks societal views on the acceptance of punishments—whether they comport with modern understandings of dignity. By tracking the acceptance of punishments, this examination also reflects the unusualness of punishments.[89]

Next, the Court brings its "own judgment . . . to bear," subjectively examining whether the punishment serves various penological purposes, including retribution, deterrence, incapacitation, and rehabilitation.[90] By looking at whether the punishment serves these purposes, the Court examines whether the punishment is unacceptably cruel.[91] There is some dispute whether a punishment is unconstitutional if a supermajority of states have accepted it yet the punishment fails this subjective test,[92] but, when faced with the question of a punishment's constitutionality, the Court has seemed to always find that a punishment either passes or fails both steps of this evolving-standards-of-decency inquiry. In this sense, the objective and subjective examinations work together to excavate the depths of the dignity concept.

B. *The Traditional Application of These Principles*

The Court has historically applied these concepts of dignity to determine the constitutionality of punishments under the Eighth Amendment. It has consistently done so in cases dealing with types of punishment, such as denationalization and the death penalty, and also with methods of punishment, such as with electrocution and term-of-years cases.[93]

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[88] *See, e.g.*, *Kennedy*, 554 U.S. at 421 (observing the frequency of juries imposing punishment); *Roper*, 543 U.S. at 575 (looking at the international consensus on a punishment); *Atkins*, 536 U.S. at 316 n.21 (considering the opinions of professional organizations).

[89] *See* Berry, *supra* note 66, at 110–11; Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 85, 120 (2010).

[90] *Coker*, 433 U.S. at 597, 599; *accord Kennedy*, 554 U.S. at 420, 434; *Roper*, 543 U.S. at 561; *Atkins*, 536 U.S. at 319–21. Query in the death penalty context whether dangerousness is an overused concept. *See generally* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889 (2010). Note, however, the surprising relevance of rehabilitation. *See* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1231 (2013) (arguing that much of modern doctrine is premised on the notion that imposing capital punishment spurs rehabilitation); Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y 121, 122 (2014) (examining whether finality of a sentence promotes or undercuts rehabilitation).

[91] Ryan, *supra* note 89, at 85, 120–21.

[92] *See* Ryan, *supra* note 74, at 603.

[93] *See, e.g.*, Glass v. Louisiana, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (mem.); Trop v. Dulles, 356 U.S. 86, 94, 99–101 (1958) (plurality opinion). *See generally* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011) (providing an empirical view of "dignity").

For types of punishment, the Court has used the evolving standards of decency to assess the dignity of the punishment in question. In *Trop v. Dulles*, for example, the Court broadly determined that denationalization is an unconstitutional type of punishment.[94] In reaching this conclusion, the Court first affirmed that dignity is the backdrop of the Eighth Amendment and that this concept evolves along with societal standards.[95] It then explained that denationalization "is a form of punishment [even] more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community."[96] The Court further explained that, if this punishment were constitutionally permissible, the offender would, "[i]n short, [have] lost the right to have rights."[97]

In other type-of-punishment cases, the Court's rulings have been narrower but still true to the Court's Eighth Amendment jurisprudence. In *Kennedy v. Louisiana*, for example, the Court held that the punishment of death for the crime of child rape was unconstitutional,[98] and in *Atkins v. Virginia*, the Court held that the death penalty was unconstitutional as applied to intellectually disabled offenders.[99] In these cases, the Court has also emphasized that the "[e]volving standards of decency must embrace and express respect for the dignity of the person."[100] Consistent with precedent, the Court typically assesses the state of these standards by examining both objective indicia like state-counting and subjective indicia like the purposes of punishment.[101]

The Court has also followed these Eighth Amendment guidelines in assessing the constitutionality of punishment methods, although punishment methods have rarely been challenged. In *In re Kemmler*, for example, the Court suggested that the Eighth Amendment did not proscribe executions by electrocution (rather than hanging).[102] The Court also suggested that the dignity requirement of the Amendment prohibits torturous punishments,

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[94] *Trop*, 356 U.S. at 101.

[95] *Id.* at 100–01.

[96] *Id.* at 101.

[97] *Id.* at 102.

[98] Kennedy v. Louisiana, 554 U.S. 407, 413 (2008).

[99] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[100] *Kennedy*, 554 U.S. at 420; *accord Atkins*, 536 U.S. at 311–12 ("As Chief Justice Warren explained in his opinion in *Trop v. Dulles*: 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (alteration in original) (citation omitted) (quoting *Trop*, 356 U.S. at 100–01)).

[101] Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1396–99 (2011) (discussing the objective and subjective indicia courts assess).

[102] *See In re* Kemmler, 136 U.S. 436, 444, 446–47 (1890).

though.[103] In other cases, the Court has relied heavily on this idea of prohibited torture, emphasizing the Eighth Amendment dignity facet of humanness.[104] While not finding that any particular method is unconstitutional, the Court has delineated the constitutional boundaries of methods in such cases by pointing to examples of torture and distinguishing the method in question from such examples.

Unlike with punishment types and methods, the Court has strayed from these constitutional principles in assessing the constitutionality of punishment techniques—an area that has recently seen significant legal attention. In this arena, the Court has largely abandoned these foundational aspects of the Eighth Amendment, focusing more narrowly on the elusive question of pain.

IV. LETHAL INJECTION AND NEW TECHNIQUES

The Supreme Court has historically followed these core Eighth Amendment principles related to offender dignity in assessing the constitutionality of punishments. To be sure, commentators have criticized the Court for massaging the facts, fudging its state-counting, and giving mere lip service to precedents,[105] but the Court has at least generally maintained its Eighth Amendment framework when confronting these difficult issues. This has held true as execution methods have evolved from hanging to more modern methods. In recent years, though, the Court has strayed from these core Eighth Amendment principles in examining the constitutionality of punishment techniques.[106] These cases have arisen in the controversial context of lethal injection litigation. Not only has the Court departed from its traditional constitutional guideposts in assessing these lethal injection techniques, but it also has weakened its analyses—and general legal and societal assessments of these techniques—by allowing tremendous secrecy to creep into the process of states executing individuals through lethal injection.

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[103] *See id.* at 447 ("[I]t is safe to affirm that punishments of torture . . . are forbidden by that [A]mendment to the Constitution." (quoting Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878))).

[104] Baze v. Rees, 553 U.S. 35, 48 (2008); *Wilkerson*, 99 U.S. at 135–36.

[105] *See Atkins*, 536 U.S. at 342 (Scalia, J., dissenting) ("The Court pays lipservice to these precedents as it miraculously extracts a 'national consensus' forbidding execution of the mentally retarded from the fact that 18 States—less than *half* (47%) of the 38 States that permit capital punishment . . . —have very recently enacted legislation barring execution of the mentally retarded." (citation omitted) (quoting *id.* at 316 (majority opinion))).

[106] *See* Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1301 (2007) ("Distressingly, the courts evaluating [Eighth Amendment] claims have almost no law to guide them. . . . No clear precedent exists to guide courts in formulating . . . remedies.").

A. *The Transformation of Capital Punishment*

Much of modern Eighth Amendment litigation has focused on the constitutionality of the various permutations of imposing lethal injection. This litigation has grown out of a long history of carrying out executions in the United States.[107] In accordance with the evolving standards of decency framework that the Court first set out in *Trop*, "states generally have sought to introduce more humane methods of execution once the actual implementations of pre-existing methods were scrutinized and shown to be too barbaric, flawed, or open to a high risk of painful or gruesome error relative to other available options."[108] Hanging was the primary method of execution at the time of the Founding.[109] But in 1890, New York instead implemented use of the electric chair after a series of disastrous public hangings before large crowds prompted a search for a less barbaric means to execute.[110] Over the next several decades, states continued to experiment with other methods of execution, as the electric chair did little to mitigate the perceived barbarism of execution.[111] Some states used firing squads or lethal gas, for example, but the results were arguably even worse than with electrocution.[112] In 1977, two Oklahoma doctors developed lethal injection as a technique for carrying out executions.[113] States viewed this method as an important improvement in the evolution of the death penalty, as it boasted improvements in terms of cost, speed, aesthetics, and legislative marketability.[114] There was less concern about whether the method was indeed a *humane* innovation in punishment.[115]

B. *Modern Lethal Injection Jurisprudence*

By 2008, most states had adopted lethal injection as their primary method of execution, and most of these states had adopted a three-drug protocol for carrying out these executions.[116] As the Court has explained:

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[107] Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics as Amicus Curiae Supporting Petitioners at 4–12, *Baze*, 533 U.S. 35 (No. 07-5439).

[108] *Id.* at 4–5; *see also* BANNER, *supra* note 2, at 169; Denno, *supra* note 4, at 91–92.

[109] *See* Denno, *supra* note 5, at 62.

[110] SARAT, *supra* note 7, at 63; Denno, *supra* note 5, at 62.

[111] Denno, *supra* note 5, at 62–64; *Far Worse than Hanging*, N.Y. TIMES, Aug. 7, 1890, at 1.

[112] Denno, *supra* note 5, at 63. *See generally* SARAT, *supra* note 7 (discussing the historical development and demise of several execution methods).

[113] Ziva Branstetter, '*Father of Lethal Injection' Talks About History, His Legacy to Oklahoma*, TULSA WORLD (May 8, 2014), http://www.tulsaworld.com/news/state/father-of-lethal-injection-talks-about-history-his-legacy-to/article_0bb18eb4-7706-524a-8bf0-00a4f6117fa7.html [https://perma.cc/CJ2Y-NC3U].

[114] Denno, *supra* note 5, at 65.

[115] *Id.*

[116] *See* Baze v. Rees, 553 U.S. 35, 42–44 (2008).

> The first drug, sodium thiopental (also known as Pentothol), is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection. The second drug, pancuronium bromide (also known as Pavulon), is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest. The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs.[117]

Around 2005, two death row prisoners from Kentucky, Ralph Baze and Thomas C. Bowling, challenged this three-drug protocol as unconstitutionally cruel and unusual.[118] They argued that the protocol created an unnecessary risk that the State would improperly administer the first drug—the barbiturate sedative—and that the death row inmate would suffer significant pain as a result.[119] The Court rejected this claim, but in doing so it strayed from its traditional Eighth Amendment framework of assessing dignity and the evolving standards of decency and instead focused on the potential pain imposed by the punishment. Specifically, in *Baze v. Rees,* the Court concluded that an offender must establish that the "lethal injection protocol creates a demonstrated risk of severe pain."[120] The offender "must show that the risk is substantial when compared to the known and available alternatives."[121]

After *Baze*, however, the question of the constitutionality of lethal injection remained unsettled.[122] Beginning in 2010, circumstances intervened to complicate the business of lethal injection per usual, leading to additional death penalty litigation.[123] In that year, the primary American manufacturer for sodium thiopental, a commonly used lethal injection drug, stopped producing the drug.[124] Shortly thereafter, a major European producer of pentobarbital, another barbiturate commonly used in executions, began

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[117] *Id.* at 44 (citations omitted).

[118] *Id.* at 46.

[119] *See id.* at 47, 49 ("[P]etitioners claim that there is a significant risk that the procedures will *not* be properly followed—in particular, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered.").

[120] *Id.* at 61.

[121] *Id.*

[122] Indeed, Justice Stevens' concurring opinion in *Baze* predicted as much. *Baze*, 553 U.S. at 87 (Stevens, J., concurring in judgment).

[123] *See* Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1380 (2014).

[124] *Id.* ("In 2010, Hospira, Inc., the sole U.S. manufacturer of thiopental, ceased domestic production of the drug at its domestic plant due to an 'unspecified raw material supply problem.'" (quoting Carol J. Williams, *Maker of Anesthetic Used in Executions Is Discontinuing Drug*, L.A. TIMES (Jan. 22, 2011), http://articles.latimes.com/2011/jan/22/local/la-me-execution-drug-20110122 [https://perma.cc/DG9K-B5DC])).

requiring its customers to promise they would not use the drug in executions.[125] Unable to secure a central drug used in executions through traditional channels, states attempted to obtain drugs through questionable sources, such as "a 'fly-by-night' middleman operating out of a west London driving school," "a man in India who told [a] Swiss pharmaceutical company . . . that he would use their free samples to provide anesthetics in Zambia," and compounding pharmacies, which are not subject to the same rigorous regulation that large pharmaceutical companies are.[126] States also continued experimenting with various new protocols for lethal injection to continue carrying out executions with the drugs to which they *did* have access.[127] For example, Florida was the first state to experiment with midazolam as part of a three-drug lethal injection protocol in 2013.[128] And Ohio first used the drug in a two-drug protocol in 2014.[129] States have used a variety of lethal injection protocols that involve anywhere from one to three drugs and make use of drugs such as midazolam, pentobarbital, hydromorphone, vecuronium bromide, potassium acetate, and sodium thiopental.[130] Again, death row inmates challenged these protocols, which led to the Supreme Court revisiting the matter of lethal injection in *Glossip v. Gross*.[131]

In *Glossip*, the Court again approved the method of lethal injection and upheld the State's technique for carrying it out.[132] Drawing on its holding in *Baze*, the Court explained that the petitioners had failed to establish that the "protocol create[d] a demonstrated risk of severe pain and that the risk [was] substantial when compared to the known and available alternatives."[133] With

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[125] *Id.* at 1381 ("[T]he Danish company Lundbeck, Inc., the world's sole producer of injectable pentobarbital, announced that it would not sell the drug to states for use in executions and would require its customers to pledge not to resell the drug to prisons.").

[126] *Id.* at 1381–84.

[127] *See State by State Lethal Injection*, *supra* note 9 ("The six executions carried out in January 2014 represent[ed] four different lethal injection protocols, some of which involved drugs never before used in executions . . . .").

[128] *Id.*

[129] *Id.*

[130] *See id.*

[131] *See* Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015).

[132] *Id.* It is worth noting that, although we refer to the protocols at issue in *Baze* and *Glossip* as "techniques," the Court referred to these approaches to capital punishment as "methods" in these cases. *See id.* at 2738 ("Our first ground for affirmance is based on petitioners' failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution."); Baze v. Rees, 553 U.S. 35, 57 (2008) ("[T]he comparative efficacy of a one-drug method of execution is not so well established that Kentucky's failure to adopt it constitutes a violation of the Eighth Amendment."). Indeed, the Court has failed to distinguish between techniques and methods.

[133] *Glossip*, 135 S. Ct. at 2737. More precisely, because the petitioners were challenging the denial of a preliminary injunction, the Court applied the corresponding preliminary injunction standard: "The preliminary injunction posture of the present case

respect to the risk of severe pain, the Court acknowledged that assessing this risk is difficult.[134] "[F]ederal courts should not," the Court explained, "embroil themselves in ongoing scientific controversies beyond their expertise."[135] As a result, the Court emphasized that it is the *petitioner* who bears the burden of establishing that this risk exists.[136] Because the petitioners had failed to satisfactorily establish this risk that fell outside of the Court's area of expertise, they lost on this ground.[137] The petitioners also failed to establish a satisfactory alternative.[138] With respect to this new doctrinal requirement, the Court relied on the assumption that, if capital punishment is constitutional, there must be a constitutional way to carry it out.[139] Although the Court borrowed this idea from the *Baze* opinion,[140] the *Glossip* Court transformed it into a requirement that the petitioner establish a new acceptable way of carrying out the punishment.[141] Because the petitioners failed to establish such an alternative, they lost on this ground as well.[142]

Even after the drug shortages and constitutionality questions that gave rise to *Baze* and *Glossip*, lethal injection remains the primary method of execution in the United States.[143] Although states have considered different lethal injection techniques involving a variety of drugs, many have continued their reliance on the injection of a paralytic.[144]

C. *The Problem of Secrecy*

In addition to this transformation of doctrine in Eighth Amendment technique cases, secrecy has increasingly crept into lethal injection executions. Today, state governments shroud modern executions with multiple levels of secrecy, a disturbing notion in an open, democratic society.[145] Unlike most events in modern society, executions do not appear on television or the

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thus requires petitioners to establish a likelihood that they can establish both that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives." *Id.*

[134] *See id.* at 2740.

[135] *Id.* (alternation omitted) (quoting *Baze*, 553 U.S. at 51).

[136] *Id.* at 2739 ("[P]etitioners bear the burden of persuasion on this issue.").

[137] *See id.* at 279–40.

[138] *Id.* at 2738.

[139] *Glossip*, 135 S. Ct. at 2738–39.

[140] *See Baze*, 553 U.S. at 47 ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out." (citation omitted)).

[141] *See Glossip*, 135 S. Ct. at 2737–39.

[142] *Id.*

[143] Denno, *supra* note 4, at 69.

[144] *State by State Lethal Injection*, *supra* note 9.

[145] *See* GARLAND, *supra* note 8, at 55.

Internet.[146] Once a public spectacle, executions are now private affairs, conducted in the presence of a small number of media, state officials, family members of the crime victim(s), and family members of the prisoner.[147] States conduct these procedures in a clandestine manner, often late in the evening and hidden from public sight.[148] As a result, most Americans do not have access to executions today.

Not only have executions transitioned from the public to the private sphere, leaving most Americans without the experience of watching someone die by lethal injection or firing squad, but also gaining any access to the details of these executions is exceedingly difficult, if not impossible. For example, states keep the identifications of the executioners secret and, in the lethal injection context, states also keep the identities of the drugs used to execute the offenders hidden.[149] As lethal injection drugs have become unavailable as European manufacturers have ceased making such drugs or boycotted their use for the purpose of executing prisoners,[150] states have further experimented with new drugs and protocols, sometimes with horrific effects.[151] In many cases, states have elected to keep the identity of the new drugs secret, as well as the names of the drug manufacturers.[152] This is either to insulate the drugs from challenge, maintaining some independence of the departments of corrections that oversee the details of executions, or it is to protect the entities providing the drugs from the protests of passionate anti-death-penalty activists.[153] This secrecy complements states' traditional determinations to keep the identities of executioners secret.

There is yet another level of secrecy involved in lethal injection, resulting from often employing a paralytic to prevent the offender from screaming and

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[146] *Id.*; *see also* Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461, 465–66 (1995).

[147] GARLAND, *supra* note 8, at 53–54; Denno, *supra* note 4, at 63–64.

[148] GARLAND, *supra* note 8, at 53.

[149] Berger, *supra* note 123, at 1416–17; Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1379–81 (2014).

[150] Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES (Nov. 8, 2013), http://www.nytimes.com/2013/11/09/us/executions-stall-as-states-seek-different-drugs.html [https://perma.cc/7TPK-A4C7]; *see also* Andrew Welsh-Huggins, *Shortage of Drug Holds Up Some U.S. Executions*, NBCNEWS.COM (Sept. 27, 2010), http://www.nbcnews.com/id/39385026/ns/health-health_care/t/shortage-drug-holds-some-us-executions/ [https://perma.cc/TJA9-MK7V].

[151] *See* Denno, *supra* note 149, at 1366 ("Given the impact of drug shortages on lethal injection procedures, it should come as no surprise that states are seeking help internally from local compounding pharmacies for the production of lethal injection drugs. Yet recent discoveries of subpar conditions and contaminated drugs demonstrate the risk posed by compounding pharmacies." (footnotes omitted)).

[152] *Id.* ("This risk provides states with an incentive to keep their lethal injection protocols secret because of the foreseeable challenges that they will face should it become known that the drugs are coming from pharmacies of this kind.").

[153] *Id.*; *see also* Berger, *supra* note 123, at 1416, 1418–19.

writhing as the state pumps lethal drugs into his veins.[154] Instead, the offender lies motionless on a gurney.[155] Most three-drug protocols follow the use of an anesthetic with the use of a paralytic.[156] The paralytic renders the prisoner motionless.[157] As a result, one cannot determine whether the anesthetic has had, and continues to have, any effect.[158] And the full panoply of effects that the potassium chloride or other lethal drug has on the prisoner is unknowable, and thus remains veiled.[159] The prisoner cannot communicate with anyone because of the paralytic—he cannot speak or move.[160] The prisoner often has no visible physical reaction to the lethal drug other than to cease breathing.[161] The body's reaction to the three-drug cocktail becomes unknowable because of the paralytic.[162] The paralytic also helps hide the psychological reaction of the prisoner to the lethal injection cocktail.[163] Whether the prisoner feels the helplessness of being conscious and paralyzed remains unknown.[164] This psychological reaction, specifically as it reflects the degree to which the procedure tortures the prisoner or otherwise degrades him by dragging out the experience of dying, remains unknown.[165] Ultimately, these procedures appear medical in nature, with the prisoner in a bed with an intravenous drip.[166] The secrecy of the procedures serves to mask the reality of the state's conduct

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[154] *See* Denno, *supra* note 5, at 55–56.

[155] *See* Denno, *supra* note 4, at 100.

[156] Denno, *supra* note 5, at 55–56 (describing how the paralytic drug would "mask indications that the inmate was conscious and in excruciating pain from feelings of suffocation as well as intense burning as the potassium chloride entered the vein").

[157] *See* Denno, *supra* note 4, at 100.

[158] *See id.* at 100, 108–09.

[159] Denno, *supra* note 10, at 484–84; *see also* Baze v. Rees, 553 U.S. 35, 49 (2008) ("[T]here is a significant risk that the procedures will *not* be properly followed—in particular, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered.").

[160] *See* Denno, *supra* note 5, at 55–56.

[161] *Id.* at 98 ("[C]hemical quantities offer the most valuable and revealing indication of a particular state's knowledge of the lethal injection process. But the mere listing of chemicals is no assurance that department of corrections officials are conducting procedures correctly."); *see also* Denno, *supra* note 4, at 109 (noting that an inmate might be experiencing pain but it would be hidden by the paralytic drug).

[162] *See* Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 265 (2009); Denno, *supra* note 5, at 55–56.

[163] Berger, *supra* note 162, at 265; Denno, *supra* note 5, at 67 n.110.

[164] *See* Denno, *supra* note 5, at 55–56.

[165] *See* Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting from denial of certiorari) (mem.); Berger, *supra* note 123, at 1372 ("Without access to information about execution protocols, the inmate's Eighth Amendment protection against unconstitutional executions evaporates, because the state can conceal details of its execution procedure, thereby insulating it from judicial review. To safeguard the inmate's Eighth Amendment right, then, courts should require states to disclose all material details of their execution procedures.").

[166] SARAT, *supra* note 7, at 119; *see also* Denno, *supra* note 5, at 66–67.

toward the prisoner.[167] In many ways, the secrecy shields the lethal injection protocols from legal and societal scrutiny.[168]

V. SHIELDING LETHAL INJECTION

The change in doctrine and increase in secrecy that have accompanied experimentation with lethal injection techniques have led to the shielding of lethal injection as a method of punishment and of the techniques used to carry out this method. This shielding of lethal injection occurs in two ways. First, the new doctrine and secrecy have erected a doctrinal shield, making it nearly impossible to challenge the legality of lethal injection and its accompanying techniques.[169] Second, they have raised a societal shield, preventing the public from effectively scrutinizing the appropriateness of lethal injection as an execution method and of the techniques now used to carry it out.[170]

A. *Doctrinal Shield*

Troublingly, the new lethal injection doctrine and the secrecy inherent in lethal injection proceedings provide a doctrinal shield; with the details of the execution remaining secret, it becomes difficult, if not impossible, for opponents to challenge the procedure under the Eighth Amendment. *Glossip v. Gross* demonstrated this legal difficulty.[171] Following its decision in *Baze v. Rees*, the Court in *Glossip* explained that a lethal injection technique must pose a "substantial risk of serious harm" to violate the Eighth Amendment, and the challenger must also demonstrate the existence of an alternative technique.[172] Without access to the identity of the drugs and executioners employed, and with the use of the paralytic, potential challengers generally lack clear evidence of the specific harms that the procedure poses and how the technique might compare to alternatives.[173] Accordingly, it has become nearly impossible for challengers to demonstrate such a risk.[174]

First, the paralytic often employed in these procedures shrouds any outward signs of the offender's pain.[175] As a result, the procedure itself

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[167] *See* Berger, *supra* note 162, at 311–12.

[168] GARLAND, *supra* note 8, at 53–55.

[169] *See infra* Part V.A.

[170] *See infra* Part V.B.

[171] *See* Glossip v. Gross, 135 S. Ct. 2726, 2781 (2015) (Sotomayor, J., dissenting).

[172] *Id.* at 2737 (majority opinion) (quoting Baze v. Rees, 553 U.S. 35, 50 (2008)).

[173] *See id.* at 2737; *Baze*, 553 U.S. at 50.

[174] Denno, *supra* note 4, at 117; *see also Glossip*, 135 S. Ct. at 2737.

[175] Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 SANTA CLARA L. REV. 445, 448 (2007) ("[T]he use of a paralytic agent . . . masks the effect of the barbiturate sedative expended to render the inmate unconscious. Because this drug renders an inmate unable to speak or gesture, the inmate could be conscious and in excruciating pain without anyone else knowing of his suffering.").

ordinarily fails to provide direct proof of the offender suffering pain.[176] Despite this difficulty, the recent "botched" executions do provide an indication that lethal injection protocols have very possibly caused pain.[177] It remains unclear whether this is a result of executioners bungling the anesthetic component of the protocol or whether an error in dispensing the paralytic has just revealed pain that is ordinarily present when states use lethal injection.[178]

Second, petitioners generally lack the ability and resources to gain information about the risk of pain inherent in any lethal injection protocol outside of instances in which it is employed on criminal offenders.[179] And in these circumstances, the government has not made it possible to study the pain experienced by the offenders.[180] Outside of this context, there has been little, if any, scientific research, or even the regular use of these protocols.[181] Accordingly, there is a lack of information about how these drugs interact in one's body, making it difficult for petitioners to compile evidence that the protocol poses a "substantial risk of serious harm."[182]

Third, even if petitioners had access to information about pain possibly imposed by the protocol, it is difficult to assess what constitutes a "substantial risk of serious harm."[183] Petitioners and the state alike lack technology to reliably measure pain, and there has been little guidance about how much pain is too much.[184] Pain imposed beyond what is necessary to carry out the punishment is likely excessive and unconstitutionally cruel, but it remains difficult to assess what amount of pain is too much.[185] In tension with the Court's statement in *Glossip* that, "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out,'"[186] the current techniques of carrying out lethal

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[176] *Id.*

[177] Berger, *supra* note 123, at 1372 ("[I]n recent years, there have been several instances of botched executions, often involving grisly accounts of inmates convulsing or crying out from the gurney."); *see infra* Part VI.A.1.

[178] Denno, *supra* note 4, at 99, 111.

[179] *Glossip*, 135 S. Ct. at 2792 (Sotomayor, J., dissenting) (discussing the petitioner's inability to challenge evidence); *see also* Berger, *supra* note 123, at 1373–74.

[180] Berger, *supra* note 123, at 1372.

[181] Denno, *supra* note 5, at 70–75; *see also* Berger, *supra* note 123, at 1418–21; Denno, *supra* note 149, at 1379–80.

[182] *See* Denno, *supra* note 4, at 109–11 (describing how different bodies may be impacted differently by the drugs).

[183] Baze v. Rees, 553 U.S. 35, 53 (2008); *see also Glossip*, 135 S. Ct. at 2793–94 (Sotomayor, J., dissenting).

[184] *See Glossip*, 135 S. Ct. at 2792–93 (Sotomayor, J., dissenting) (discussing the Court's varying spectrum on what constitutes a "barbarous" punishment); *see also Baze*, 553 U.S. at 59–60 (discussing proposed technology to be used to monitor pain).

[185] Denno, *supra* note 4, at 108–12; *see also* SARAT, *supra* note 7, at 22. *See generally* PAIN, DEATH, AND THE LAW (Austin Sarat ed., 2001) (discussing the role that pain plays in legal theory and jurisprudence).

[186] *Glossip*, 135 S. Ct. at 2732–33 (alterations in original) (quoting *Baze*, 553 U.S. at 47).

injection are not necessarily constitutional even if, among the currently employed techniques of lethal injection, they carry the smallest risk of imposing serious harm.[187] If all currently employed lethal injection techniques constitute torture, for example, they would be unconstitutionally cruel and unusual according to the Court's long history of proscribing torturous punishments under the Eighth Amendment.[188] Thus, the death penalty can be unconstitutional in all forms by practical standards of the Constitution despite the Court's insistence that the type of punishment—the death penalty itself—remains constitutional.[189]

Fourth, the *Glossip* Court's determination that petitioners bear the burden to establish this risk exacerbates petitioners' difficulties in obtaining evidence about the risks of serious harms posed by a particular lethal injection technique.[190] The state is the party with the greatest access to evidence about the employed technique and the risks it poses to individual offenders.[191] In some circumstances, petitioners do not even have access to the protocol that the state will use in the offender's execution.[192] And they certainly do not have access to the identity of the executioners and thus cannot make a claim based on the incompetency of the personnel carrying out the execution.[193] This secrecy on the part of the state, paired with the unknown nature of the protocols employed to carry out executions, make it nearly impossible for petitioners to make out an Eighth Amendment challenge about the lethal injection technique used to carry out executions.

B. *Societal Shield*

Not only do the new lethal injection doctrine and states' secrecy about executions erect a doctrinal shield protecting the death penalty, but they also support a broader societal shield. The effect of the three levels of secrecy inherent in most lethal injection proceedings—the private nature of the event; the secrecy surrounding the identity of the executioners, drugs, and drug manufacturers; and the use of a paralytic—is a shield from societal scrutiny of lethal injection proceedings.[194] In particular, by limiting the number of observers, states stifle observational accounts of what might be experienced by

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[187] Berger, *supra* note 162, at 310–12.

[188] *See, e.g.*, *In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

[189] Of course, at least two Justices on the Court have cast serious doubt as to whether the death penalty is constitutional as a type of punishment. *See Glossip*, 135 S. Ct. at 2776–77 (Breyer, J., dissenting, joined by Ginsburg, J.).

[190] *See id.* at 2792–93 (Sotomayor, J., dissenting); *Baze*, 553 U.S. at 71–77 (Stevens, J., concurring in judgment).

[191] *See* Berger, *supra* note 123, at 1388–91; *see also* Denno, *supra* note 5, at 95–96.

[192] Berger, *supra* note 123, at 1388–91; Denno, *supra* note 5, at 95–96.

[193] Berger, *supra* note 162, at 304.

[194] Berger, *supra* note 123, at 1432–36.

those being executed.[195] By hiding the identities of the drugs used, many states make it impossible for citizens to understand exactly the means by which states execute condemned prisoners.[196] This also stymies attempts to research what is happening to those being subjected to these drugs and procedures.[197] By refusing to disclose the identities of the personnel and drug manufacturers employed, states can ward off challenges to the competencies of these entities and individuals making the executions possible.[198] And by using a paralytic, states hide any psychological or physical pain the lethal drug cocktail causes the inmate.[199] Without more information about the techniques used to carry out executions, the public (and the Supreme Court) cannot properly assess the suitability of these execution procedures.[200]

It is important to note that societal assessments of these death penalty techniques should bear heavily on legal assessments of the techniques. The Court's historical Eighth Amendment analysis that focuses on dignity and evolves with societal standards relies in part on societal assessments—primarily state-counting.[201] If societal assessments change, then legal assessments might change as well. Accordingly, the societal shield protecting the death penalty feeds back into the doctrinal shield, making legal assessments of death penalty techniques ineffective.

VI. THE UNDERMINING OF LETHAL INJECTION

The doctrinal framework and the clandestine nature of lethal injection raise the question of whether there are consequences to the approach adopted by the Supreme Court and jurisdictions across the United States. A close examination of the lethal injection protocol used by most states demonstrates that serious consequences spring from the Court's new lethal injection doctrinal framework and the decision to make the administration of the death penalty largely secret. Specifically, the secrecy of lethal injection, paired with the new doctrine the Court created in *Baze* and *Glossip*, raise constitutional questions about the lethal injection procedures themselves, as well as about lethal injection's legitimacy as a method of execution.[202]

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[195] *Id.* at 1435.

[196] *Id.* at 1388 ("[B]ecause they know their drugs and methods cannot be trusted, death penalty states often keep important details of their execution procedures secret."). Additionally, many states conceal information regarding "the qualifications of the person inserting the catheter into the inmates' veins, the qualifications of the person mixing the drugs, the qualifications of the person monitoring the inmate's anesthetic depth, the chemical properties of the actual drugs used, and the amounts of the drugs to be injected." *Id.* at 1391.

[197] *See id.* at 1418–21; *see also* Denno, *supra* note 5, at 70–75.

[198] Berger, *supra* note 123, at 1416–19.

[199] *See* Denno, *supra* note 4, at 100.

[200] *See* Denno, *supra* note 5, at 96.

[201] *See supra* text accompanying notes 85–89.

[202] *See infra* Part VI.A–.B.

A. *Constitutional Questions*

In *Baze* and *Glossip*, the Court abandoned the full dignity inquiry that it had previously applied in the punishment type and method cases like *Trop* and *In re Kemmler*.[203] Instead, the Court shrank the inquiry to focus on only the possibility of pain suffered by the individual being executed.[204] In doing so, the Court has strayed from its Eighth Amendment precedents, and, without explanation, now treats punishment techniques differently than types of punishments and punishment methods.[205]

In contrast to the Court's approach to these lethal injection technique questions, the Eighth Amendment does not distinguish between punishment types, methods, and techniques. The Amendment instead states broadly that "cruel and unusual punishments [shall not be] inflicted."[206] As the Court has stated over and over again that dignity is central to interpreting the meaning of the Eighth Amendment for punishment types and methods,[207] so too should dignity be at the heart of the inquiry of the constitutionality of punishment techniques like those now used in the arena of lethal injection.

The concept of dignity transcends the question of pain that the Court focused on in the technique cases of *Baze* and *Glossip*. As the Court has demonstrated in its Eighth Amendment punishment type and method cases, the core of dignity is proportionality and the humanness of the offender—questions broader than mere pain.[208] As demonstrated in the Court's cases limiting the use of the death penalty, Eighth Amendment analysis considers the type, method, or technique brought to bear on the individual offender.[209] Indeed, the use of the technique with respect to the individual offender ought to remain at the heart of the analysis.

The seminal case of *Trop*, itself, demonstrates that the dignity inquiry is much broader than the Court's focus on physical pain in *Baze* and *Glossip*.[210] The denationalization punishment that was at issue in *Trop* did not involve any physical pain, but instead the Court explained that the concept of dignity

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[203] *Compare* Glossip v. Gross, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring) (ignoring the question of dignity and applying the substantial risk of pain test), *and* Baze v. Rees, 553 U.S. 35, 57 (2008) (same), *with* Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (focusing on the question of dignity), *and In re* Kemmler, 136 U.S. 436, 447 (1890) (same).

[204] *Glossip*, 135 S. Ct. at 2737 (citing *Baze*, 553 U.S. at 50).

[205] *See id.* at 2737–38.

[206] U.S. CONST. amend. VIII.

[207] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) ("As Chief Justice Warren explained in his opinion in *Trop v. Dulles*: 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (alteration in original) (citation omitted) (quoting *Trop*, 356 U.S. at 100–01)).

[208] *See supra* text accompanying notes 64–68.

[209] *See supra* notes 28–30 and accompanying text.

[210] *See Trop*, 356 U.S. at 100–01.

prohibited the punishment because it destroyed the offender's "right to have rights."[211] Even though physical pain was not an issue, the punishment was deemed inhuman and therefore a violation of the Eighth Amendment prohibition on cruel and unusual punishments.[212]

The Court's new doctrine for lethal injection techniques and the secrecy involved in these executions raise some serious questions about respecting the dignity of the offender, which remains the bedrock principle of the Eighth Amendment. In particular, doctrine and secrecy raise questions about torture, experimentation on inmates, the neglect of viewing inmates as individuals, and preventing humane offender knowledge. Further, this doctrine and secrecy raise questions about challengers' abilities, and their rights, to raise these important constitutional questions.

1. *Torture*

First, the procedures now used to carry out lethal injection, shielded from both legal and societal scrutiny,[213] pose the very real possibility that states are torturing prisoners, regardless of whether this is intentional. Although states have limited the number of witnesses able to attend modern-day executions,[214] a striking number of modern observer accounts have suggested that inmates being executed by lethal injection may very well be undergoing some sort of torture.[215] For example, when Oklahoma executed Michael Lee Wilson, he exclaimed that he could "feel [his] whole body burning" shortly after he was injected.[216] In Ohio, witnesses observed Dennis McGuire "convulsing and gasping for air" during his execution.[217] Similarly, those watching Clayton Lockett's execution saw him "'writhing and bucking' on the gurney."[218] As Justice Sotomayor explained her *Glossip* dissent, death by lethal injection with midazolam creates a significant risk of severe pain.[219] The typical use of midazolam occurs in cases where physicians intend to sedate a patient for a short period of time.[220] Simply increasing the dose of midazolam may not increase the time of sedation, though.[221] And if the midazolam wears off, the inmate's experience would be the equivalent of being burned alive from the

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[211] *Id.* at 102.
[212] *Id.* at 103.
[213] *See supra* Part V.
[214] GARLAND, *supra* note 8, at 53–54.
[215] Berger, *supra* note 123, at 1372 ("[I]n recent years, there have been several instances of botched executions, often involving grisly accounts of inmates convulsing or crying out from the gurney.").
[216] Lithwick, *supra* note 19 (quoting Michael Lee Wilson).
[217] *Id.*
[218] *Id.* (quoting press reports of the execution).
[219] Glossip v. Gross, 135 S. Ct. 2726, 2781 (2015) (Sotomayor, J., dissenting).
[220] *Id.* at 2783–84.
[221] *Id.* at 2783.

inside.[222] In other words, midazolam may facilitate the imposition of a torturous punishment, hidden by a paralytic.

Individuals have observed these disturbing effects of the lethal injections despite the paralytic ordinarily masking from observers any pain that the inmate experiences.[223] In these botched executions, the intense pain caused by the potassium chloride becomes apparent.[224] This suggests that the number of instances in which these potentially painful experiences take place could be significantly greater.

To be sure, it is unclear whether this outward appearance of pain mirrors pain experienced by the executed individual. The pain actually experienced could be either greater or less severe. The paralytic could be dimming the appearance of pain by masking much, if not all, of it. Or the observed pain could just reflect physical reflexes not actually felt by the offender. Without adequate research on the effects of the drugs on the human body, it is difficult to know what exactly the offender is undergoing.

In addition to masking physical pain, the paralytic could also hide psychological torment. As the effect of midazolam remains unknown during a lethal injection process, it is possible that the prisoner might be aware of the paralysis, imposing severe emotional trauma on the prisoner.[225]

Death row inmates are still human; a death sentence may extinguish their lives, but does not deprive them of their humanity. To hide the details of the lethal injection protocol or identity of the drugs from them, however, denies them the dignity with which to face death. In some cases, denying such information could arguably constitute a sort of psychological torture.[226] To the extent that the state imposes torture—whether physical or psychological—it strikes at the very heart of the Eighth Amendment prohibition on cruel and unusual punishments.

2. *Experimentation on Inmates*

The lethal injection procedures of many states likewise infringe upon the dignity of the prisoner because of the procedures' experimental natures.[227] Because states are injecting prisoners with untested lethal drug cocktails not properly assessed for safety, the prisoners strapped to the gurneys serve as guinea pigs.[228] The drug combinations and doses are novel, and it seems that

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[222] *Id.* at 2793.

[223] *See* Berger, *supra* note 123, at 1372; see also SARAT, *supra* note 7, at 120.

[224] Berger, *supra* note 123, at 1372.

[225] *See Glossip*, 135 S. Ct. at 2791–92 (Sotomayor, J., dissenting).

[226] *See* Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality opinion) (discussing how the unknown consequences of punishment cause the individual "ever-increasing fear and distress" and are "offensive to cardinal principles for which the Constitution stands").

[227] *See* Berger, *supra* note 123, at 1386–87 (noting botched executions as the result of states experimenting with execution procedures).

[228] Berger, *supra* note 162, at 267–68; *see also* Denno, *supra* note 4, at 99–100.

the results—other than the likely death of the prisoner—are unpredictable.[229] The offender dignity that the Court has time and again said is the backdrop of the Eighth Amendment protection against cruel and unusual punishments means that the individual offender must be taken into account in carrying out punishment.[230] This equates to not experimenting on these prisoners even if they have been legally condemned to die.

3. *Neglecting the Individual*

Even if the use of a paralytic does not result in physical and psychological torture, and even if these novel procedures were not experimental in nature, the decision to use a paralytic for the benefit of the observers undermines the dignity of the prisoner. While preventing the prisoner from convulsing on the table might comfort an observer, the decision to place the emotional comfort of the observer ahead of the effect of the protocol on the prisoner ignores the offender's dignity.[231] Under the Eighth Amendment dignity demand, the effect of the procedure on the prisoner in killing him ought to be the central concern of the state in establishing its protocol, not the degree to which the procedure would be palatable to an observer.[232]

The degree to which the masking of the procedure through the paralytic satisfies a broader state goal to maintain public support for capital punishment constitutes an even more objectionable threat to the prisoner's dignity. To kill in a secretive way in order to engender public support for more killing strikes at the heart of the concept of offender dignity.[233] An unconstitutional lethal injection procedure does not magically become constitutional simply by hiding it.

Further, the rationale for the adoption of new procedures in many states is startling. States have not adopted new protocols or chosen new drug cocktails because such procedures would improve the efficacy of the state killing or reduce the prisoner's pain during such a procedure. Rather, the states have adopted these new approaches because they are unable to procure the drugs required by their prior procedures.[234] Indeed, the unavailability of drugs has driven the new procedures, not considerations of the impact of the protocol on the prisoner.[235] Attending to these outside reasons for adopting these protocols that put the offender at risk compromises the dignity of condemned prisoners.

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[229] *See* Denno, *supra* note 4, at 108–11.

[230] *See* Berger, *supra* note 162, at 310–11; *see also supra* notes 63–68 and accompanying text.

[231] *See Trop*, 356 U.S. at 100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); Ryan, *supra* note 60, at 2144.

[232] *See* Ryan, *supra* note 60, at 2144.

[233] *See* Berger, *supra* note 162, at 310.

[234] *See* Denno, *supra* note 149, at 1366; *see also supra* notes 150–53 and accompanying text.

[235] *See* Denno, *supra* note 149, at 1366.

4. *Inmate Knowledge*

The decision to hide the identity of lethal injection drugs and the details of protocols likewise denigrates the dignity of prisoners. Irrespective of one's criminal transgressions, one ought to, as a matter of human rights, receive an explanation of the procedure by which the state intends to kill him, including the drugs it intends to use. Even the Court's own decision in *Ford v. Wainwright*,[236] where it held that executing "insane" persons is unconstitutionally cruel and unusual, emphasized the importance of the prisoner knowing what is happening to him.[237] There, the Justices explained that, for a punishment to be constitutional, the prisoner must understand what is happening to him and why.[238]

5. *Ability to Challenge*

Finally, denying prisoners the information concerning the identities of the drugs, drug manufacturers, and executioners, and the nature of the protocol overall, infringes on their ability to challenge the constitutionality of such procedures under the Eighth Amendment. Where the states use judicially approved procedures, such a need dissipates, but in the current environment of drug shortages and changing procedures, the ability to know the identities of the drugs, manufacturers, and executioners, and the nature of the protocols, is essential to making a constitutional challenge—a right that every offender should have.[239]

B. *Legitimacy Questions*

In addition to the many constitutional questions that they raise, the new doctrine and secrecy in executions also suggest a number of questions related to the legitimacy of the method of execution itself. To be palatable, the death penalty must provide the community with a sense that it achieves justice in a

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[236] Ford v. Wainwright, 477 U.S. 399, 409–10 (1986); *see also* Stewart v. Martinez-Villareal, 523 U.S. 637, 639 (1998) (affirming the *Ford* principle).

[237] *See Ford*, 477 U.S. at 417 ("It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications."); *id.* at 422 (Powell, J., concurring in part and concurring in the judgment) ("I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.").

[238] *See id.* at 417 (majority opinion); *id.* at 421–22 (Powell, J., concurring in part and concurring in the judgment); *see also* Panetti v. Quarterman, 551 U.S. 930, 954–60 (2007) (holding that the state should not execute a person if the person does not understand the reason for their imminent execution). For an interesting discussion on how the *Panetti* decision relates to retributive theory, see generally Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. L. REV. 1163 (2009).

[239] *See supra* notes 149–52 and accompanying text.

meaningful way through execution.[240] At the heart of this effort is drawing a clear distinction between the act of execution and the killing that necessitated the execution—a distinction between lawful and unlawful killings.[241] To accomplish this, the state must find a way of killing that "does not allow the condemned to become an object of pity, or to appropriate the status of the victim."[242]

Historically, the state achieved legitimacy in its use of the death penalty by making public executions the center of its approach.[243] This included attempting to achieve some level of equivalence between the pain inflicted in the crime and the pain inflicted in the state killing.[244] Public executions also served the goal of general deterrence.

As society's standards of decency have evolved, however, the source of legitimacy has shifted. Instead of achieving legitimacy through brutality, states increasingly have achieved legitimacy through making the killing seem dignified, quiet, and tranquil.[245] The decision to adopt lethal injection as a method, including employing a paralytic, arose from such a sentiment—that societal support of the death penalty hinged upon minimizing its brutality.[246]

Ironically, however, the use of secrecy in lethal injection procedures has the opposite effect—it threatens to undermine the legitimacy of the method and its procedures, as well as the death penalty more generally. The use of the paralytic in carrying out executions raises questions as to whether the procedure itself matches the calm medical procedure it portrays.[247] As the paralytic is not necessary to accomplish the killing, its use raises important questions about legitimacy.[248]

First, if the paralytic masks real and significant pain, then the state effectively hides its method of barbaric killing from the public. Further, if the paralytic's only purpose is to hide this pain—a serious possibility considering that the paralytic serves no real medical purpose here—then using it raises serious questions about what the state intends to hide.

Second, if the paralytic masks only subtle, painless manifestations of lethal injection, such as a body violently convulsing in response to a lethal drug, it still suggests that the procedure performed has some impropriety. The

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[240] *See* Denno, *supra* note 4, at 91–92.

[241] *See* SARAT, *supra* note 7, at 4.

[242] *Id.* at 4–5.

[243] *Id.* at 7–8; *see also* GARLAND, *supra* note 8, at 24–25; Madow, *supra* note 146, at 465.

[244] THE DEATH PENALTY IN AMERICA 4–9 (Hugo Adam Bedau ed., 3d ed., 1982); GARLAND, *supra* note 8, at 64; SARAT, *supra* note 7, at 4–5.

[245] *See* Madow, *supra* note 146, at 469.

[246] *See* Baze v. Rees, 553 U.S. 35, 42–44 (2008).

[247] Denno, *supra* note 4, at 100.

[248] *See id.* (noting that pancuronium bromide creates the appearance that the inmate is serene, but the inmate could actually be in pain).

decision to hide the true consequence of lethal injection from observers suggests, at the very least, some public discomfort with the procedure.[249]

To be sure, the manner in which the state carries out lethal injection procedures presents a misleading picture. By making the lethal injection appear like a peaceful, tranquil medical procedure, the state attempts to differentiate its killing from the condemned aggravated murder it punishes.[250] But the secrecy of the process—the great lengths taken to hide the reality of the state's act, which amounts to a violent taking of a human life—casts doubt on the legitimacy of the killing.

The broader secrecy surrounding death procedures likewise raises questions about the legitimacy of lethal injection. By hiding the execution from society, the state disassociates the reality of its killings from the justice it purportedly imposes.[251] States do not have to televise executions to secure their legitimacy, but cloaking them with secrecy and making them generally unavailable to the media, much less the public at large, undermines their efficacy in distinguishing these killings from unlawful ones and also in deterring future offenders.[252]

The decision to hide the identities of the drugs and their manufacturers, and the identities of the personnel involved in the executions, likewise undermines the legitimacy of lethal injection.[253] The fear of retaliation from those who oppose the death penalty does not entirely explain or justify this secrecy.[254] Further, the lengths to which states have gone to obtain lethal injection drugs, including alleged illegal methods of doing so, suggests a surprising desperateness to execute those condemned to die, at least in some states. But the decision to hide the means by which the state endeavors to do so indicates a degree of shame or perhaps impropriety that makes secrecy necessary.[255] The secrecy obscures an entire line of inquiry about the appropriateness of the state conducting the procedure in the first place.

Finally, hiding the process by which the state executes its prisoners undermines legitimacy in that it offends basic concepts of democracy. Again, it erects a societal shield by which ordinary citizens lack the resources to form

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[249] *Cf.* Madow, *supra* note 146, at 556–57 (discussing how displaying executions publicly might "arous[e] pity" for the criminal or would shame people into "abolishing executions" (quoting in part HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY 214 (1993))).

[250] *See* SARAT, *supra* note 7, at 4.

[251] *See* GARLAND, *supra* note 8, at 53–55.

[252] A 2011 Georgia lethal injection was videotaped, but kept under seal by the judge. Erica Goode, *Video of a Lethal Injection Reopens Questions on the Privacy of Executions*, N.Y. TIMES (July 23, 2011), http://www.nytimes.com/2011/07/24/us/24video.html [https://perma.cc/9RE4-FUQQ].

[253] *See* Berger, *supra* note 123, at 1388, 1416, 1418–19.

[254] *See* Glossip v. Gross, 135 S. Ct. 2726, 2733 (2015); *see also* Berger, *supra* note 123, at 1416.

[255] *See* Berger, *supra* note 123, at 1416.

educated opinions about the propriety of these executions.[256] In order to determine whether a death procedure is consistent with societal values, citizens must have some understanding of the manner in which the state imposes capital punishment.[257] The clandestine nature of the proceeding, the failure to disclose the identity of the drugs used and their manufacturers, the lack of information about the executioners, and the effects of the lethal injection cocktail hidden by the paralytic all hide common knowledge of the death penalty.[258] This thwarts the democratic principle of providing citizens a voice in the manner in which a state punishes its criminals.

In sum, the Court's new doctrine and the extreme secrecy involved in today's executions raise real questions of legitimacy. Portraying modern executions as serene medical procedures serves evolved societal expectations of decency. But this portrayal also shifts the justification for the practice from achieving equivalence between the crime and punishment through brutality to making the punishment death alone rather than one accompanied by pain and suffering. States have gone to great lengths to construct this image. But states' insistence on the many levels of secrecy shrouding modern executions paradoxically reveals that this image may be just that—only an image. Instead of justifying executions, this secrecy raises concerns about the legitimacy of executions.

VII. CONSEQUENCES OF TRANSPARENCY

The Court's new doctrine and the veil of secrecy surrounding today's executions raise the question of what consequences might flow from transparency. Transparency could be achieved on several levels. Televising or streaming executions would make them publicly available.[259] This would spur the public to be more aware of the executions that are currently taking place behind closed doors and it would also at least in part expose the gruesome nature of these events.[260] The thought of making executions mainstream may seem unnecessary and horrifying,[261] but, if this is the case, perhaps that means that executions, themselves, are unnecessary and horrifying. If our appetites for brutality and violence have changed since the first executions in this country, then perhaps our punishments should change as well, and not just in their appearances. Hiding the brutality does not change the brutality.

Eliminating the use of paralytics in executions and revealing the drugs, drug manufacturers, and executioners involved in lethal injection procedures

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[256] *See supra* Part V.B.

[257] *See* Denno, *supra* note 5, at 96.

[258] *See* Berger, *supra* note 123, at 1432–36.

[259] GARLAND, *supra* note 8, at 55; *see also* Madow, *supra* note 146, at 465–66.

[260] *See* Denno, *supra* note 4, at 105–07.

[261] One might also object to the public nature of such executions on the ground of the offender's dignity. However, preserving offender choice might be a good way to preserve offender dignity but retain transparency in at least some circumstances.

could also improve transparency.[262] These moves would be less extreme and likely would be more politically palatable and easier to achieve. Eliminating these levels of secrecy, though, would begin to shatter the impression that modern executions are serene medical events.[263] Even by lifting only these less extreme measures of secrecy, significantly greater transparency can be achieved, ameliorating some of the constitutional and legitimacy concerns already raised. If the states removed the paralytic, one could view, at least externally, the effect of the drugs on the prisoner, including the physical and verbal reaction of the prisoner to the drugs.[264] Making the identities and manufacturers of the drugs employed publicly available would allow further study of the drugs and increase the understanding of how they might operate to kill the prisoner.[265] Similarly, identifying the individual executioners might generate an evaluation of the qualifications needed to conduct an execution.[266] Exposing all of these facets of executions would spur a reassessment of whether the techniques uphold the dignity of executed offenders.[267] It would further a more informed determination of whether these executions amount to torture.[268] It would provide the opportunity for further research on the drugs employed so that experimentation on the death row offenders would no longer be necessary.[269] It would refocus the spotlight on what the individual offenders are experiencing rather than on the observer's experience.[270] And it would allow the offenders to have adequate information about what will happen to them during the procedure.[271] In each of these senses, states would be less likely to violate the Eighth Amendment requirement of respecting offender dignity.

The perhaps more significant consequence of making lethal injection executions more transparent would be a societal reconsideration of lethal injection as a method of execution, and the acceptability of the death penalty more generally.[272] Removing the paralytic might reveal a more gruesome kind of death penalty. The true nature of lethal injection, unsheathed, might not reflect the serene scene projected by procedures using a paralytic.[273] The

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[262] Denno, *supra* note 5, at 55–56.

[263] Without the paralytic there would be no mask to hide "indications that the inmate was conscious and in excruciating pain from feelings of suffocation as well as intense burning as the potassium chloride entered the vein." *Id.*

[264] *See id.*

[265] *See* Berger, *supra* note 123, at 1432–36.

[266] *Id.* at 1433.

[267] *See supra* Part VI.A.

[268] *See supra* Part VI.A.1.

[269] *See supra* Part VI.A.2.

[270] *See supra* Part VI.A.3.

[271] *See supra* Part VI.A.4.

[272] Indeed, Justice Breyer's dissent in *Glossip*, joined by Justice Ginsburg, called for a re-examination of the constitutionality of the death penalty. Glossip v. Gross, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

[273] *See* Denno, *supra* note 5, at 55–56.

botched lethal injections in recent years demonstrate this reality.[274] If a paralytic-free lethal injection even partially mirrors the botched execution outcomes, then the death penalty will face the same scrutiny as it did during the time that states abandoned electrocution for lethal injection.[275] As with electrocution, such a method would raise constitutional questions, both in terms of torture and dignity more broadly.

Similarly, a public understanding of the drugs states use, and the physiological manner in which they cause death, might undermine public enthusiasm for lethal injection as a method of execution. The idea that states are experimenting on death row inmates may strike some observers as unsavory and questionable. The lack of medical knowledge concerning how the chosen drug cocktails interact might also cast doubt upon lethal injection as a method of execution.

Further, a review of the credentials held by executioners might give public observers pause. Greater examination of the roles of the medical personnel involved—or to the extent medical personnel are not involved—in executions could dispel for some the myth of the medical nature of today's lethal injections. This, too, might have an effect on the public's acceptance of any particular lethal injection technique or of the method of lethal injection overall.

Greater transparency, then, might call into question modern lethal injection techniques and the method of lethal injection itself. In light of the current pharmaceuticals available,[276] states may not be able to administer lethal injection in a way that does not cause a violent physical reaction on the part of the prisoner. States may not be able to administer it in a way that does not constitute experimentation on vulnerable human beings. If the public will not tolerate these modern techniques, then perhaps we must search for a different method of execution. Some states and scholars have already called for a return to firing squads, electrocution, and other execution methods.[277]

Whether it is constitutional to reach back into history and resurrect old methods of execution remains to be decided.[278] But it is important to remember that states largely disregarded these older methods with the advent of lethal injection because of the belief that other methods were much more brutal. While a small, conservative minority might embrace a return to one or more of these methods, an affirmative step to use one of these techniques may

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[274] *See, e.g.*, SARAT, *supra* note 7, at 144; Lithwick, *supra* note 19.

[275] *See* Denno, *supra* note 4, at 77–90 (discussing the transition from electrocution to lethal injection as the states' preferred death penalty procedure).

[276] *See* Denno, *supra* note 149, at 1360–66.

[277] Associated Press, *States Consider Electrocution, Hanging, Firing Squads as Execution Drugs Get Hard to Find*, TIMES-PICAYUNE (Oct. 20, 2015), http://www.nola.com/politics/index.ssf/2015/10/states_consider_electrocution.html [https://perma.cc/ARR4-95YU].

[278] *See* Berry, *supra* note 52.

also further diminish support for capital punishment.[279] A single hanging or electrocution might be enough to convince many states to pursue the path toward abolition, like seven states have done since 2004.[280] So, with an acceptable method of punishment in question, the propriety of the death penalty, itself, is also in question. Indeed, the future of the death penalty might hinge on the ability of states to conduct lethal injections in a humane manner.

A core sentiment in the *Glossip* opinion rested upon making sure that the "guerilla warfare" attacks on suppliers of lethal injection drugs by death penalty abolitionists did not succeed.[281] As such, if the death penalty is constitutional, the Court explained, there must be a constitutional technique for administering it.[282] For any particular punishment to be constitutional, however, every facet of the punishment must be constitutional—the technique, the method, and the type of punishment. If there is no constitutional way to carry out the punishment of death then, although the death penalty itself may be constitutional, states cannot legally use it. Just because the death penalty may in theory be constitutional does not mean that the Constitution tolerates torture just to impose that type of punishment.

Certainly, it is unlikely that the unavailability of a particular technique or method of execution will result in the ultimate death of capital punishment in America. Nonetheless, transparency in the current lethal injection procedures—including public viewing of the killings; public knowledge of the drug identities, drug manufacturers, and individual executioners; and removal of the paralytic—might be an important means to accelerate the decline of the death penalty in the United States. If the public had information to actually assess the propriety of these death penalty techniques, it could really affect societal assessment of them. The popularity and constitutionality of the death penalty has waxed and waned in this country since its founding.[283] In 2015, the death-sentencing rate again declined, and the number of executions

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[279] There are significant questions as to whether a return to older methods would be constitutional. *Id. But see* Arthur v. Dunn, 137 S. Ct. 725, 725 (2017) (Sotomayor, J., dissenting from denial of certiorari) (mem.) (arguing that Arthur's request for a firing squad satisfies the *Glossip* standard).

[280] *States with and Without the Death Penalty as of November 9, 2016*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty [https://perma.cc/5XDE-R4NF]; *see also* Meghan J. Ryan, *On the Road to Abolition: Capital Punishment and Its Uncertain Future in the United States*, JURIST (Feb. 24, 2016), http://jurist.org/forum/2016/02/meghan-ryan-capital-punishment.php [https://perma.cc/5RVG-GAX5].

[281] *See* Glossip v. Gross, 135 S. Ct. 2726, 2733–34 (2015); Kim Bellware, *Justice Alito Blasts Death Penalty Abolitionists for 'Guerrilla War,'* HUFFINGTON POST (Apr. 29, 2015), http://www.huffingtonpost.com/2015/04/29/alito-death-penalty-guerrilla-war_n_7175718.html [https://perma.cc/ND8N-U6T2].

[282] *Glossip*, 135 S. Ct. at 2732–33.

[283] Jeffrey M. Jones, *The Death Penalty*, GALLUP (Aug. 30, 2002), http://www.gallup.com/poll/9913/death-penalty.aspx [https://perma.cc/4EFK-MS3R].

decreased.[284] Perhaps even more tellingly, the geography of the use of the death penalty over the past decade reveals that only a handful of counties are responsible for a large majority of the executions in the United States.[285] Even in recent polls asking whether the death penalty is a good idea, people's answers differ depending on how the question is asked. If the surveyed individuals are given the option of a heinous murderer being sentenced to life in prison instead of death, their support for the death penalty drops.[286] Without a doubt, support for the death penalty continues to decline, even with the current clandestine use of lethal injection.[287] And maintaining secrecy about the details of capital punishment fosters support for the punishment.[288] Without this secrecy, public support for lethal injections could very well plummet.

VIII. CONCLUSION

The Supreme Court's modern approach to lethal injection jurisprudence is problematic. In its recent cases, the Court has strayed from its traditional Eighth Amendment precedents in addressing whether various lethal injection techniques amount to unconstitutionally cruel and unusual punishments. Instead of focusing on the dignity of offenders and the evolving standards of decency that affect this analysis, the Court has focused almost exclusively on offender pain. In doing so, the Court has separated out lethal injection technique questions from more traditional questions of punishment types and methods. Problematically, the Court has done this without acknowledging or explaining the reasons for this departure.

While creating this new doctrine, the Court has also tolerated significant secrecy to creep into the practice of lethal injection. These components have shielded lethal injection from effective doctrinal challenges as well as from true societal scrutiny. Moreover, the Court's new doctrine and the secrecy that surrounds today's executions raise a whole host of constitutional and legitimacy concerns. Together, they hide the potentially torturous consequences of lethal injection, cultivate experimentation on death row inmates, neglect the individual offender, and prevent inmates from

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[284] *See generally* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2015: YEAR END REPORT (Dec. 2015), https://deathpenaltyinfo.org/documents/2015YrEnd.pdf [https://perma.cc/UW8B-XAY4].

[285] *See, e.g.*, Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 308–09 (2010); Robert J. Smith, Essay, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 228 (2012).

[286] Jones, *supra* note 283.

[287] *See generally* DEATH PENALTY INFO. CTR., *supra* note 284; THE ROAD TO ABOLITION? THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009); Denno, *supra* note 149, at 1345 (discussing possible reasons why support has declined).

[288] *See* GARLAND, *supra* note 8, at 53–55.

understanding what is happening to them in their final hours. Further, the Court's approach makes it exceedingly difficult for death row inmates to challenge the techniques that will be used to carry out their lethal injection executions. Additionally, because of the great lengths to which states go to hide the nuances of their lethal injection procedures, one might argue that the justifications for execution diminish with the decreased deterrence value and retributive force of medicalized executions.

Transparency in the realm of executions may be difficult to implement, but lifting at least one layer of secrecy could very well expose the unsettling underbelly of executions in modern-day America. It could reveal unintentional torture, experimentation, and various incompetencies. This could, in turn, significantly erode support for lethal injection and the death penalty overall.

The *Glossip* Court suggested that, because the death penalty is constitutional, there must be a constitutional way to carry it out. But the constitutionality of the death penalty cannot justify torturous or otherwise unconstitutional punishment methods or techniques. In losing sight of the relationship between punishment types, methods, and techniques, the Court lost its way in navigating how the Eighth Amendment must apply to lethal injection and the various techniques for carrying it out. In doing so, the Court has unintentionally undermined not only the constitutionality of the death penalty as applied in this country but also its legitimacy.